Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1979.

No. 79-1894

JOYCE PAGNIELLO,

*Petitioner,*

*v.*

STATE OF NEW JERSEY.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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JOYCE PAGNIELLO,

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STATE OF NEW JERSEY.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

JOYCE PAGNIELLO, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of New Jersey, entered in the above entitled matter on April 7, 1980.

## OPINIONS BELOW.

On April 7, 1980 the Supreme Court of New Jersey denied a Motion for Leave to Appeal to the Supreme Court of the State of New Jersey, the Order entered by the Superior Court of New Jersey, Appellate Division, denying defendant-appellant Joyce Pagniello's Motion for an Order permitting counsel to represent the petitioner pro hac vice, in an opinionless per curiam order which has not been officially reported (App. A, *infra*, p. A1), thereby leaving in effect the opinionless per curiam order of the Superior Court (Appellate Division), entered February 21, 1980 also not officially reported (App. B, *infra*, p. A2). This Order permitted the Trial Court's Order, that of the Superior Court of New Jersey Law Division of Monmouth County, denying the motion pro hac vice without a hearing or assignment of any reason to remain undisturbed. The trial judge filed an order on January 14, 1980 denying the defendant's motion for an order permitting counsel to enter the matter as attorney pro hac vice (App. C., *infra*, p. A3).

## JURISDICTION.

The order of the Supreme Court of New Jersey (App. A, *infra*, p. A1) denying the Motion for Leave to Appeal to the Supreme Court of the State of New Jersey, was entered on April 7, 1980. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

## QUESTION PRESENTED.

1. Did a state trial court's denial of a Motion to Admit Out-of-State Attorney Pro Hac Vice, in a state criminal prosecution, without a hearing or assignment of any reason violate principles of due process and equal protection and the defendant's rights pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

## CONSTITUTIONAL PROVISIONS INVOLVED.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE.

This case is before the Court at a time when interstate practice by attorneys in this country is an ever-increasing and expanding phenomenon. There are multiple factors which have created this situation, some of which include: The mobility of the bar, their clients and related problems; a greater degree of uniformity of substantive law and procedure amongst the states and between state and federal practice; and the demise of the general practitioner in favor of the increasingly specialized practitioner capable of transcending local boundaries and local expertise. The foregoing becomes particularly evident in the representation of defendants in criminal cases in which fundamental rights guaranteed by the Fifth, Sixth and Fourteenth Amendments are involved.

This case presents a clear and poignant example of the type of fundamental constitutional violations that are arising more frequently as a result of the foregoing. Herein, a state criminal defendant desiring her counsel, an out-of-state attorney (Pennsylvania), to represent her in a New Jersey state criminal prosecution was denied same without a hearing or assignment of any reason by the state trial judge, and her subsequent appeals to the Superior and Supreme Courts of New Jersey were denied without opinion; thereby depriving petitioner of her choice of counsel without any explanation.

The Petition presents the important question concerning the rights of a criminal defendant to her choice of counsel, equal protection, and due process under the Fifth, Sixth and Fourteenth Amendments, and whether the aforementioned rights guarantee representation pro hac vice in a state criminal prosecution absent compelling and articulated reasons to the contrary.

On September 26, 1979, Joyce Pagniello was arrested along with her husband, Domenic Pagniello in the Borough of Sea Bright, County of Monmouth, New Jersey and charged with various drug violations. Shortly thereafter, Ms. Pagniello retained Theodore Simon, Esquire, an attorney admitted to practice in Pennsylvania,[1] to represent her in said matter, after becoming aware of his excellent reputation as an attorney in criminal defense matters and that his particular expertise was in connection with drug related offenses. It was and still is her strong desire to have Mr. Simon represent her.

Mr. Simon frequently spoke with Ms. Pagniello subsequent to her arrest, during the investigative stages, and represented her at a probable cause hearing in Sea Bright Municipal Court before the Honorable Ronald L. Horan. At the hearing, Paul F. Chaiet, Esquire, First Assistant Prosecuting Attorney for the County of Monmouth, represented the State of New Jersey and Alan Silber, Esquire represented the co-defendant Domenic Pagniello.

The Municipal Court found probable cause on each of six counts alleged against Ms. Pagniello and forwarded same to the Monmouth County Prosecutors office for grand jury action. Subsequently, a grand jury returned a seven-count indictment, charging Ms. Pagniello in counts five and six, with possession of cocaine and methamphetamine *N. J. S.* 24:21-20a(1) and possession of cocaine and methamphetamine with intent to distribute *N. J. S.* 24:21-19a(1). Domenic Pagniello, and Jeffrey Woods also are charged in the same indictment.

On January 4, 1980, the date set for arraignment, the defendant moved the Court for an order permitting Theodore Simon, Esquire to represent her pro hac vice, relying

1. Theodore Simon is also admitted to practice before the United States Supreme Court, and Federal District Court (Eastern District of Pennsylvania).

on the affidavits of the defendant [2] and counsel.[3] By letter dated January 8, 1980, the Honorable Patrick J.

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2. JOYCE PAGNIELLO, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I have been named as a co-defendant in the within Indictment, and have been charged in Counts 5 and 6 with possession of CDS, and possession with intent to distribute CDS, both drug related offenses.

2. I was arrested on September 26, 1979 in the Borough of Sea Bright, County of Monmouth, New Jersey.

3. Shortly after my arrest, I sought to retain legal counsel to represent me in this matter. Through friends, I was referred to Theodore Simon, Esq., and learned of his excellent reputation as an attorney in criminal defense matters, and that his particular expertise was in connection with drug related offenses. I immediately made an appointment to confer with Mr. Simon, and after doing so, retained him to represent me in this matter.

4. I have conferred with Mr. Simon frequently during the investigative phases of this matter, and have absolute confidence and trust in his ability. Mr. Simon represented me at my probable cause hearing in Sea Bright Municipal Court. It is my strong desire to have Mr. Simon continue my representation in this matter.

5. Therefore, I would respectfully request that the Court grant the within motion admitting Theodore Simon, *pro hac vice*, as my attorney in the within matter, thereby giving me the fair opportunity of counsel of my choice and insure the full panoply of my rights pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as the similar and applicable rights provided under the New Jersey Constitution. *Gideon v. Wainwright*, 372 U. S. 335, 33 S. Ct. 792 L. Ed. 2d 799 (1963); *Crooker v. California*, 357 U. S. 433, 478 S. Ct. 1287, 2 L. Ed. 1448 (1958).

3. THEODORE SIMON, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a graduate of the University of Temple Law School, and have been admitted to practice before the Supreme Court of Pennsylvania and all inferior Courts in the State of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania and the United States Supreme Court.

2. My law offices are presently located at 117 South 17th Street, Philadelphia, Pennsylvania 19103, and I have been a practicing attorney in the State of Pennsylvania since my admittance to the Bar in 1974. My practice is almost entirely

McGann, Jr. denied the motion to admit Theodore Simon, Esquire, pro hac vice, citing *Burlington Co. Int. Med. Assn. v. American Medicorp Inc.*, 168 N. J. Super. 382 (Ch. Div. 1979) (App. C, *infra*, p. A5). On January 14, 1980, the Honorable Patrick J. McGann, Jr. formally ordered that the defendant's Motion be denied, apparently excising the case previously relied upon (*Burlington, supra*), (App. C, *infra*, p. A4). The lower

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3. (Cont'd.)
limited to criminal defense work, and my particular specialty has been in dealing with cases involving drug-related offenses.

3. I have previously been admitted to act *pro hac vice* in the defense of drug-related charges in the State of Maryland (*State v. Olson*), the State of New Jersey (*State v. Addeo*, Burlington County, 1977, and *State v. Hunt, et al.*, Salem County, 1978), the United States District Court in West Virginia (*United States v. Anderson, et al.*), the United States District Court in South Carolina (*United States v. Blank*), and the United States District Court in Virginia (*United States v. Santigillo*).

4. Shortly after her arrest on September 26, 1979, I was contacted by Joyce Pagniello, a co-defendant in the within Indictment. After consultation, Mrs. Pagniello retained me to act as her attorney in the defense of the charges lodged against her. I agreed to represent her and have continued to act as her attorney since that time. I have frequently conferred with Mrs. Pagniello and the attorney for her husband, Dominick Pagniello (a co-defendant in this matter) Alan Silber, Esq. I represented Mrs. Pagniello at the Probable Cause Hearing in this matter in the Sea Bright Municipal Court, Sea Bright, New Jersey.

5. Mrs. Pagniello had repeatedly indicated to me that it is her strong desire that I continue to represent her in the defense of the charges against her.

6. Therefore, I would respectfully request the Court grant the within motion, admitting me, *pro hac vice*, as attorney for Joyce Pagniello, thereby giving her the fair opportunity of counsel of her choice and insuring the full panoply of her rights pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as the similar and applicable rights provided under the New Jersey Constitution. *Gideon v. Wainwright*, 372 U. S. 335, 33 S. Ct. 792 S. Ct. 792 L. Ed 2d 799 (1963); *Crooker v. California*, 357 U. S. 433, 478 S. Ct. 1287, 2 L. Ed. 1448 (1958).

court did not assign reasons for its decision, nor did it hold a hearing.

Although cognizant of New Jersey Rule 1:21-2,[4] Appearances Pro Hac Vice, which place the ultimate decision within the discretion of the Court, out of State counsel in the few times in which admission was sought in New Jersey same was granted pro forma.

On January 29, 1980, the defendant appealed to the Superior Court of New Jersey filing the defendant's Brief and appendix in Support of Motion for Leave to Appeal Order Denying Defendant's Motion to Admit Out-of-State Attorney Pro Hac Vice. On February 20, 1980, the Superior Court denied the Motion for Leave to Appeal in an opinionless per curiam order (App. B, *infra,* p. A2). Thereafter, on March 7, 1980, an appeal was taken to the Supreme Court of New Jersey wherein, the defendant-appellant filed a Motion (and letter brief) for Leave to Appeal to the Supreme Court of the State of New Jersey, the Order entered by the Superior Court of New Jersey, Appellate Division, denying defendant-appellant's Mo-

4. *1:21-2. Appearances Pro Hac Vice*

An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual, or a member or employee of a partnership, or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this State, of good standing, who is not domiciled in this State and who does not maintain in this State his principal office for the practice of law, may, at the discretion of the court in which any matter is pending, be permitted, pro hac vice, to speak in such matter in the same manner as an attorney of this State who is domiciled in and maintains a bona fide office for the practice of law in this State or maintains in this State his principal office for the practice of law; and who is therefore, pursuant to R. 1:21-1(a) authorized to practice in this State; provided, however, that all pleadings, briefs and other papers filed with the court shall be signed by an attorney of record authorized to practice in this State, who shall be held responsible for them and for the conduct of the cause and of the admitted attorney therein.

tion for an Order permitting counsel to represent the Petitioner pro hac vice. On April 7, 1980 the Supreme Court of New Jersey in an opinionless per curiam order denied the Motion for Leave to Appeal (App. A, *infra*, p. A1).

It is impossible to determine from the Supreme Court's Order, the Superior Court's Order or Trial Court's Order denying admission pro hac vice the basis for said denial.[5]

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5. The Petitioner's trial date, as set by the Honorable Patrick J. McGann, J. S. C., is presently scheduled for June 16, 1980. On April 22, 1980, the Petitioner filed a Notice of Motion to Stay all proceedings with Judge McGann pending this Honorable Court's review of the instant Petition for Writ of Certiorari. (Said Motion had not been decided at the time the instant Petition was submitted for printing.)

## REASONS FOR GRANTING THE WRIT.

### 1. The State Trial Court's Denial of a Motion to Admit Out-of-State Attorney Pro Hac Vice in a Criminal Prosecution Without a Hearing or Assignment of Any Reason Violates Principles of Due Process and Equal Protection and Petitioners Rights Guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

It is a well established principle that the right of the accused to have the aid of counsel for his defense is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment. *Powell v. Alabama,* 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This guarantee, included in the Bill of Rights, a fundamental safeguard of liberty, is immune from federal abridgement and equally protected against state invasion by the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2nd 799 (1963).

The United States Supreme Court in *Johnson v. Zerbst,* 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) stated:

> "The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done' ". Id. at 462, 58 S. Ct. 1023, 82 L. Ed. 1465 (1938).

Implicit in this guarantee is an individual's right to retain counsel of his or her choice, *U. S. v. Bergamo,* 154 F. 2d 31 (3rd Cir. 1946). The New Jersey courts concur

with the interpretation of the Sixth Amendment, holding in *Zasada v. State,* 19 N. J. Super. 589, 89 A. 2d 45 (1952) that, "In order that the constitutional guarantee may be effective, it is essential that a defendant be afforded a fair opportunity to secure counsel of his choice" (at 591, 47). Additionally, the Court in *Zasada* held that the force of the Sixth Amendment whose phraseology is identical to that of pertinent sections of the New Jersey State Constitution should be applied as strenuously to ensure all defendants in New Jersey criminal prosecutions the same guarantees as those inherent in the Sixth Amendment. Similarly, in *Jacobson v. Jacobson,* 151 N. J. Super. 62, 376 A. 2d 558 (1977), the court held that:

> "It is beyond dispute that both the federal and state constitutions grant to an accused the right to have the assistance of counsel for his defense. Included within the scope of this constitutional right is the right of an accused to secure counsel of his own choice." Id. at 65, 376 A. 2d 561 (1977).

The Supreme Court in *Glasser v. U. S.,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942) stated that "the assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired" (Id., at 70). And as recent as October 15, 1979, the Third Circuit Court of Appeals in *U. S. v. Laura,* (3rd Cir. 1979) 607 F. 2d 52 stated:

> The right to the assistance of counsel is a critical element of our American system of jurisprudence. A defendant's decision to exercise that right and to place his liberty and possibly his life in the hands of an attorney of his choice may not be lightly tampered with.

In *Laura,* the defendant filed a Motion to Withdraw a guilty plea in the United States District Court for the Eastern District of Pennsylvania and was represented by an out-of-state attorney, a member of the New York Bar. The District Court ordered the defendant to secure local counsel. Laura retained a local attorney, a member of the bar of the United States District Court for the Eastern District of Pennsylvania. Subsequently, Laura filed a Motion to reassign her case to another judge alleging that the judge who was considering her Motion may have been biased against her local counsel. The Court over the objection of local counsel and the defendant, ordered the withdrawal of local counsel and for defendant's New York attorney to handle the proceedings. The New York attorney did handle the proceedings, and the District Court denied Laura's Motion to Withdraw her guilty plea and then found her in violation of probation and incarcerated her.

The Third Circuit, in remanding to the District Court, found with regard to the local counsel "that this dismissal without adequate finding may have violated the defendant's right to counsel (607 F. 2d at 53) and . . . "the arbitrary dismisal of a defendant's attorney of choice violates a defendant's right to counsel", 607 F. 2d at 56.

In determining the foregoing case the Third Circuit noted, incidentally but emphatically, "it would certainly have been error . . . if the trial judge had ordered dismissal of defendant's primary and lead counsel (New York attorney) . . . 607 F. 2d 57. Moreover, the Court held that the defendant need not show that the dismissal (of local counsel) was prejudicial as, "the right to counsel is among those 'constitutional rights [which are] so basic to a fair trial that their infraction can never be treated as harmless error.'" *Chapman v. California,* 386 U. S. 18, 23 and

n. 8, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967), 607 F. 2d at 58.

Recently, the United States Supreme Court in *Simon L. Leis Jr., et al. v. Larry Flynt et al.*, 99 S. Ct. 698 (decided 1/15/79) reviewed the rights not of defendants but of the lawyers those defendants chose to hire. In a per curiam decision, the Court reversed the Sixth Circuit Court of Appeals, holding that an out-of-state attorney does not possess a cognizable property interest within the terms of the Fourteenth Amendment and therefore, the Federal Constitution does not obligate the Ohio Courts to accord those attorneys procedural due process in passing up their application to appear pro hoc vice, as they were not afforded a hearing in the lower court of Ohio. Although, the petitioner herein and her chosen counsel support and assert Mr. Justice Stevens' (with whom Mr. Justice Brennan and Mr. Justice Marshall join) dissenting opinion in *Leis v. Flynt*, that,

> "A lawyer's interest in pursuing his calling is protected by the Due Process Clause of the Fourteenth Amendment," which protection is not abandoned when he crosses the border of the state in which he is licensed to practice (at 702).

It is significant to note that the Dissenting Opinion in *Leis v. Flynt* in footnote 1, stated at page 702:

> Although the Court does not address it, this case also presents the question whether a defendant's interest in representation by nonresident counsel is entitled to any constitutional protection. The clients, as well as the lawyers, are parties to this litigation.
>
> A defendant's interest in adequate representation is "perhaps his most important privilege" protected by the Constitution. Powell v. Alabama, 287 U. S.

45, 70. Whatever the scope of a lawyer's interest in practicing in other States may be, Judge Friendly is surely correct in stating that the client's interest in representation by out-of-state counsel is entitled to some measure of constitutional protection:

> "We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of courts as to practice before them. Cf. Lefton v. City of Hattiesburg, 333 F. 2d 280, 285 (5th Cir. 1964). Indeed, in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication." *Spanos v. Skouras Theaters Corporation*, 364 F. 2d 161, 170 (en banc) (CA2 1966) (Friendly, J.).

The Majority Opinion which was narrowly decided with regard to the attorneys' rights stated in Footnote 4:

> The court below, however, "did not reach the issue of whether the constitutional rights of Flynt and Hustler Magazine had also been violated," 574 F. 2d 874, 877 (CA 6 1978).

In fact, the Sixth Circuit in *Flynt v. Leis*, 574 F. 2d 874 (6th Cir. 1978) in reviewing the District Courts holding stated:

> The District Court held that counsel may not be refused appearance pro hac vice except upon a showing of prior unethical conduct or refusal to abide by the canons of ethics or the rules of the court. It did not reach the issue of whether the constitutional rights of Flynt and Hustler Magazine had also been violated (at 877).

Therefore, the aforementioned case has not disposed of the petitioner's rights pursuant to the U. S. Constitution nor could dispose of same pursuant to the individuals rights pursuant to the State Constitution.

Even the Majority Opinion in *Flynt* noted that the Sixth Circuit referred "to the prevalence of pro hac vice practice in American Courts and instances in our history where counsel appearing pro hac vice have rendered distinguishing service (99 S. Ct. at 699). The Court went on to state: In view of the high mobility of the bar, and also the trend toward specialization, perhaps this is a practice to be encouraged" (99 S. Ct. at 699).

In fact, in *In re Evans*, 524 F. 2d 1004 (5th Cir. 1975) the court held that absent a complaint against petitioner's retained attorney rising to the level justifying disbarment, it was outside the discretion of the trial judge to deny the motion to admit the attorney pro hac vice and accordingly granted petitioner a Writ of Mandamus. Also see *Cooper v. Hutchinson*, 184 F. 2d 119 (3rd Cir. 1950).

In *Evans*, the court went on to state:

> In *Sanders v. Russell*, 401 F. 2d 241 (5th Cir. 1968), several out-of-state attorneys involved in civil rights litigation were denied admission pro hac vice

in the Southern District of Mississippi. We granted mandamus compelling their admission. Although that case was limited to non-fee generating civil rights cases, we think these same standards should apply to fee generating cases. See *E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 381 n. 18 (S. D. Tex. 1969).

In *Sanders* we recognized that for purposes of admission to practice in federal court, admission to a state bar is the basic determinant of both professional and ethical qualifications. 401 F. 2d at 247. See also In re Ruffalo, 390 U. S. 544, 547, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). Admission to a state bar is the basic determinant of both professional and ethical qualifications. 401 F. 2d at 247. See also In re Ruffalo, 390 U. S. 544, 547, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). Admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whims of the District Court. An applicant for admission pro hac vice who is a member in good standing of a state bar may not be denied the privilege to appear except "on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." *Sanders v. Russell*, 401 F. 2d at 247-48. See also *Spanos v. Skouras Theatres Corp.*, 235 F. Supp. 1, 11 (S. D. N. Y. 1964), cert. denied, 385 U. S. 987, 87 S. Ct. 597, 17 L. Ed. 2d 448 (1966).

Due Process and equal protection principles also apply to admission to practice pro hac vice, *Flynt v. Leis*, 574 F. 2d 874, 878 (1978). In *Cooper v. Hutchinson, supra*, Judge Goodrich writing for the Third Circuit held that a state judge violated due process and the federal civil rights

law in a New Jersey murder trial when, without a meaningful hearing or statement of reasons, he withdrew permission for out-of-state counsel to appear. Furthermore, Canon 3 of the Code of Professional Responsibility of the American Bar Association discourages "territorial limitations" on the practice of law.

Although courts have denied or revoked admission of foreign counsel, that has only occurred after a hearing and for appropriate reasons. *Flynt v. Leis*, 434 F. Supp. 481 (1977). In *Ross v. Reda*, 510 F. 2d 1172 (6th Cir. 1975) the court denied admission because of gross improprieties in that counsel affirmatively refused to limit his out-of-court statements about the case during its pendency and the lower court noted the specific canons of ethics he potentially violated. Similarly, in *U. S. v. Dinitz*, 538 F. 2d 1214 (5th Cir. 1976), the court determined that the lower court acted properly in excluding foreign trial counsel because of various forms of misconduct that was not only unprofessional per se, but contemptuous. Even in *State v. Kavanaugh*, 52 N. J. 7, 243 A. 2d 225 (1968) the Supreme Court of New Jersey only revoked the attorney's authority to appear pro hac vice after his misbehavior became so gross that it threatened a fair trial. Said conduct was so outrageous that the Court in *In re Bailey*, 57 N. J. 451 (1971), suspended Mr. Bailey's ability to appear pro hac vice for one year as a result of his ethical breaches while appearing in the state courts in the aforementioned case.

In the case at bar, the petitioner relied upon the affidavits of Joyce Pagniello (petitioner) and Theodore Simon, Esquire in support of the motion to admit pro hac vice.[6] The lower court in its letter dated January 8, 1980 denied the said motion without assigning reasons or requesting a hearing therein and relied generally upon *Burlington Co. Int. Med. Assn. v. American Medicorp Inc.*,

6. See Footnotes 2, 3 *supra*.

168 N. J. Super. 382 (Ch. Div. 1979) (App. C, *infra*, p. A5). Subsequently, on January 14, 1980 the lower court formally ordered that the defendant's Motion be denied, apparently excising *Burlington, supra*, the case previously relied upon (App. C, *infra*, p. A4). It is submitted that the moving papers and affidavits were sufficient in themselves to warrant granting of the said motion, but it is further suggested that the lower court should have requested a hearing on the matter in light of the action it contemplated and ultimately rendered, or at a minimum, assigned those reasons which would indicate that it acted within its discretion and was not arbitrary.

In *Burlington, supra,* American Medi. Corp. Inc., in defending a claim alleging anti-trust violations sought admission pro hac vice of out-of-state counsel. The opinion in *Burlington* reflects that the lower court Judge determined that "the matter is one for the conscientous exercise of my discretion," *Higgins v. Polk,* 14 N. J. 490, 103 A. 2d 1 (1954) which requires certain basic information to be supplied by defense counsel. The Court after reviewing what would be the necessary proofs concluded that upon receipt of the necessary proofs, the Court would decide the question.

It is suggested that the affidavits submitted substantially comply with the basic proofs recited in *Burlington, supra.* Out-of-State counsel, through affidavit stated the various courts in which he is admitted and those in which he has been admitted pro hac vice. Moreover, the Office of the Monmouth County Prosecutor did not oppose this Motion in the trial court; and later conceded in their responsive letter briefs in the Superior Court (Appellate Division) and Supreme Court of New Jersey, counsel's good standing to practice law; competence as an attorney, particularly in the instant speciality; and the defendant's desire to be represented by said attorney. Certainly,

good cause has been shown; as out-of-state counsel has been involved in this matter since its inception, has interviewed his client on many occasions, has conducted other investigations, represented the petitioner at the probable cause hearing and consulted with co-counsel on numerous occasions. Additionally, his speciality implies the complexity of the field of law. Furthermore, First Assistant Prosecutor Paul Chaiet, was in communication with counsel, and has forwarded various correspondence including the discovery materials, which have been reviewed and investigated.

Accordingly, only through the intervention of this Court, by reviewing the Orders of the New Jersey Courts denying admission pro hac vice, can the manifest injustice of continued denial of counsel of choice in a state criminal prosecution be cured. Moreover, this is the appropriate case for this Court to provide guidance to the State and Federal Courts with respect to this ever increasing circumstance.

## CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to determine whether the New Jersey Courts have ignored or improperly interpreted the Petitioners Federal Constitutional rights insuring the Petitioner the fair opportunity of counsel of her choice; and if so, order the admission of Out-of-State counsel pro hac vice, or alternatively, remand the matter to the state trial court for review, assignment of reason, and/or hearing thereon.

Respectfully submitted,

THEODORE SIMON,
*Counsel for Petitioner.*

Dated: May 30, 1980

## APPENDIX A.

SUPREME COURT OF NEW JERSEY
M-663 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,
*Plaintiff-Respondent,*

*v.*

JOYCE PAGNIELLO,
*Defendant-Movant.*

**Order.**

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of April, 1980.

/s/ STEPHEN W. TOWNSEND,
*Clerk.*

## APPENDIX B.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. AM-397-79
Motion No. M-2166-79
Before Part E

STATE OF NEW JERSEY

*v.*

JOYCE PAGNIELLO

*Judges:* BISCHOFF, BOTTER, GREENBERG

| | |
|---|---|
| Moving Papers Filed | January 29, 1980 |
| Answering Papers Filed | February 8, 1980 |
| Date Submitted to Court | February 15, 1980 |
| Date Argued | |
| Date Decided | February 20, 1980 |

**Order.**

This matter having been duly presented to the Court, it is hereby ordered as follows:

Motion for Leave to Appeal Denied.

For THE COURT:

WILLIAM G. BISCHOFF, P.J.A.D.

Witness, The Honorable William G. Bischoff, Presiding Judge of Part E, Superior Court of New Jersey, Appellate Division, this 20th day of February 1980.

/s/ ELIZABETH MCLAUGHLIN
*Clerk of the Appellate Division*

## APPENDIX C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
INDICTMENT NO. 350-79

Criminal Action

ALAN SILBER
33 Evergreen Place
East Orange, New Jersey 07018
(201) 678-2318
Attorney for Defendant,
Joyce Pagniello (acting)

THE STATE OF NEW JERSEY,
*Plaintiff*,

*v.*

JOYCE PAGNIELLO and DOMINICK PAGNIELLO,
*Defendant.*

**ORDER DENYING MOTION TO ADMIT COUNSEL PRO HOC VICE**

(Original Filed
Monmouth County
Jan 16, 1980
Jane G. Clayton
County Clerk)

THIS MATTER having been opened to the Court by ALAN SILBER, ESQ., acting as attorney on behalf of defend-

ant JOYCE PAGNIELLO herein, for an Order permitting THEODORE SIMON, ESQ. to enter this matter *pro hoc vice*, as attorney for said defendant; notice having been given to the MONMOUTH COUNTY PROSECUTOR; oral argument having been waived, pursuant to R. 1:6-2; the Court having considered the papers submitted in support of this Motion; and good cause appearing for the making of this Order;

It is on this 14th day of January, 1980,

ORDERED, that defendant's Motion for an Order permitting THEODORE SIMON, ESQ. to enter the matter as attorney, *pro hoc vice*, be, and the same is hereby denied. ~~*Burlington Co. Int. Med. Assn. v. American Medicorp, Inc.*, 168 N.J. Super. 382 (Ch. Div. 1979).~~*

/s/ PATRICK J. MCGANN, JR.
Hon. Patrick J. McGann, Jr., J.S.C.

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* [*Burlington* case and its citation was scratched out in ink on original.]

January 3, 1980

Alan Silber, Esquire
33 Evergreen Place
East Orange, New Jersey 07013

RE: State v. Dominic and Joyce Pagniello
Indictment No. 350-79

Dear Mr. Silber:

The County Clerk has received and filed the entry of the not guilty pleas which were forwarded by messenger by you for the above defendants.

Also forwarded was a notice of motion to admit Theodore Simon Pro Hoc Vice for the purpose of representing Mrs. Pagniello. That motion is denied. *Burlington Co. Int. Med. Assn. v. American Medicorp, Inc.*, 168 N. J. Super. 382 (Ch. Div. 1979).

It is, of course, inappropriate to represent both defendants. Please arrange to have a New Jersey attorney substituted for one or the other.

Very truly yours,

/s/ PATRICK J. MCGANN, JR.
Patrick J. McGann, Jr.,
J.S.C.

PJMc/jc

CC: Paul Chaiet, Esquire
Theodore Simon, Esquire

Supreme Court, U. S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

No. 79-1894

JOYCE PAGNIELLO,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

## Petition for Denial of a Request for a Writ of Certiorari to the Supreme Court of New Jersey

LEO P. COX,
*Counsel for Respondent,*

ALEXANDER D. LEHRER,
Monmouth County Prosecutor,
Monmouth County Prosecutor's Office,
Court House,
Freehold, New Jersey 07728
(201) 431-7160

N.J. Appellate Printing Co., Inc., So. Plainfield, New Jersey (201) 753-0200

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

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JOYCE PAGNIELLO,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

---

## Petition for Denial of a Request for a Writ of Certiorari to the Supreme Court of New Jersey

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The State of New Jersey, your Respondent, respectfully prays that this Honorable Court Deny Petitioner's request that a Writ of Certiorari be issued to review the judgment of the Supreme Court of New Jersey, entered in the above entitled matter on April 7, 1980.

## OPINION BELOW

The Respondent, State of New Jersey, accepts the Petitioner's Statement of the Opinion Below as accurate.

## STATEMENT OF THE CASE

Petitioner, Joyce Pagniello, seeks review of the opinionless decisions of the New Jersey Superior Court, Law Division of Monmouth County and the Appellate Division, and the New Jersey Supreme Court denying her Motion to Admit an Out of State Attorney Pro Hac Vice.

On September 26, 1979, Joyce Pagniello and her husband Dominick Pagniello were arrested in the Borough of Sea Bright, Monmouth County, New Jersey. Both were charged with violations of the New Jersey Controlled Dangerous Substance Act.

On that date the Monmouth County Narcotics Strike Force, together with the Drug Enforcement Agency made an undercover cocaine buy from Jeffrey Woods. Woods was given $2,200.00 of marked money in exchange for the cocaine. During the course of the transaction the undercover official was told by Woods that his source Dom first sold five pounds of cocaine and was sitting on another two pounds.

After the transaction was completed, the police followed Jeffrey Woods to the Pagniello's apartment in Sea Bright, New Jersey. A search warrant was obtained for the Pagniello apartment where a quantity of cocaine and methamphetamine, together with the marked $2,200.00 given by the undercover officer to Jeffrey Woods was found.

Subsequently, the matter came before the Sea Bright Municipal Court for a probable cause hearing in which petitioner was represented by Theodore Simon, Esquire, of Philadelphia, Pennsylvania. Probable cause was found and the case was thereafter presented to a Monmouth

County Grand Jury which indicted all parties in a seven count indictment.[1]

Petitioner, Joyce Pagniello, was charged in Counts Five and Six with Possession and Possession With Intent To Distribute Cocaine and Methamphetamine.

On January 4, 1980, the date set for arraignment, defendant Joyce Pagniello moved before the Honorable Patrick J. McGann, Jr., J.S.C., for an order permitting Theodore Simon, Esquire, a member of the Pennsylvania Bar, to represent her pro hac vice. That motion was denied by Judge McGann by letter dated January 8, 1980 (App. A, Page 1a). On January 14, 1980, a formal order denying the defendant's application was entered (App. B, Page 2a). No hearing on the matter was held nor was one requested by the defendant.

On January 29, 1980, the petitioner appealed to the Appellate Division of Superior Court for Leave to Appeal the Order denying defendant's Motion to Admit an Out of State Attorney. On February 20, 1980, the Appellate Division denied the Motion for Leave to Appeal in an opinionless per curiam order (App. C, Page 3a). On March 7, 1980, the same matter was appealed to the New Jersey Supreme Court. On April 7, 1980, the New Jersey Supreme Court, in an opinionless per curiam order, denied defendant's Motion for Leave to Appeal (App. D, page 4a).

On May 30, 1980, Judge McGann denied defendant's motion for a stay of all proceedings pending this Honorable Court's review of the defendant's petition for a Writ of Certiorari.

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1. A third person, Jeffrey Woods was also indicted for narcotics law violations related to those with which the Pagniellos were charged.

## REASONS FOR DENYING THE WRIT

**The State Court's denial of a motion to admit an out-of-state attorney pro hac vice does not violate principles of due process, equal protection and Petitioner's rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.**

The State of New Jersey does not contest defendant's position that the Sixth Amendment to the United States Constitution guarantees to an accused the assistance of counsel for his or her defense in a criminal matter. *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932). The State further concedes that the Fourteenth Amendment to the United States Constitution provides that same right to a defendant in a State criminal prosecution. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963).

It is, however, a basic proposition of both federal and New Jersey case law that a defendant is not entitled to representation by the specific attorney of his or her choice when that attorney is not a member of the bar of the State in question. *Thomas v. Cassidy*, 249 F.2d 91 (4 Cir. 1957), *cert. den. Fitzgerald v. Cassidy*, 355 U.S. 958, 78 S. Ct. 544, 2 L.Ed.2d 533 (1958); *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225 (1968) and cases cited therein; *Burlington County Internal Medical Assoc. v. American Medicorp*, 168 N.J. Super. 382 (Ch. Div. 1979).

This Honorable Court has noted the prevalence of pro hac vice appearances in American courts and suggested that due to the trend toward specialization and the high mobility of the bar, that this might well be a practice to be encouraged. *Simon L. Leis, Jr., et al. v. Larry Flynt, et al.*, – U.S. –, 99 S. Ct. 698, 700, 58 L.Ed.2d 717

(1974). But it also stated, with respect to an attorney's right to appear in the courts of a state in which he is not licensed:

> [I]t is not a right granted either by statute or the Constitution. Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. 99 S. Ct. at page 700.

There is no right of federal origin that permits a lawyer to appear in state courts without meeting the bar admission requirements of that particular state. The Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another. *Id.* at 701.

*New Jersey Court Rule* 1:21-2 [2] governs pro hac vice appearances by out-of-state attorneys in the courts of that

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2. *1:21-2. Appearances Pro Hac Vice*
An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual, or a member or employee of a partnership, or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this State, of good standing, who is not domiciled in this State and who does not maintain in this State his principle office for the practice of law, may, at the discretion of the court in which any matter is pending, be permitted, pro hac vice, to speak in such matter in the same manner as an attorney of this State who is domiciled in and maintains a bona fide office for the practice of law in this State or maintains in this State his principal office for the practice of law; and who is therefore, pursuant to *R.* 1:21-1(a) authorized to practice in this State; provided, however, that all pleadings, briefs and other papers filed with the court shall be signed by an attorney of record authorized to practice in this State, who shall be held responsible for them and for the conduct of the cause and of the admitted attorney therein.

state. The rule clearly makes the approval of pro hac vice applications discretionary with the court in which the matter is pending. In *Burlington County Internal Medical Assoc. v. American Medicorp, supra,* the Court set forth four areas of proof which must be established by the applicant seeking pro hac vice admission.

The State does not doubt that Theodore Simon could, if required, produce the necessary documents to meet the first three tenors of proof: good standing to practice law; competence as an attorney, particularly in the instant specialty; and the defendant's desire to be represented by Mr. Simon. However, the fourth tenor of proof, good cause, is lacking.[3] Nothing presented by petitioner reveals the instant case to be one involving a particularly complex field of law. Petitioner is charged with Possession and Possession With Intent To Distribute Controlled Dangerous Substances. It should also be noted that Petitioner and Mr. Simon do not have a long standing attorney-client relationship. Petitioner contacted Mr. Simon for the first time shortly after her arrest and before the probable cause hearing at the Sea Bright Municipal Court.[4] Further, there is no dearth of New Jersey counsel with expertise in the defense of narcotics law violations.

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3. The Court in *Burlington County Internal Medical Assoc., supra,* at p. 384, set forth a checklist of what may constitute good cause:

   a. A complex field of law in which counsel is a specialist.
   b. A long held attorney-client relationship.
   c. Lack of local counsel with expertise in the field involved.
   d. The existence of legal questions involving the law of the foreign jurisdiction.
   e. The need for extensive discovery proceedings the foreign jurisdiction.

4. See Petitioner's Brief at page 6.

Petitioner argues that her Sixth Amendment right to counsel has been violated by the Monmouth Country trial court's refusal to admit Mr. Simon pro hac vice. To support that contention, Petitioner argues that no hearing was held and, therefore, no reasons for the denial were advanced by Judge McGann.

At no time did Petitioner request a hearing on this matter. Indeed, Petitioner's original motion was made, in accordance with *R.* 1:6-2, under which oral argument is deemed to be waived.[5] The State submits that by failing to request it, the right to a hearing was waived. Petitioner relies on several cases which she argues require that a hearing be held and reasons given for the denial of a pro hac vice application. In particular, she relies on *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979). The *Laura* case, heard in the Eastern District of Pennsylvania involved the dismissal of local counsel–which local counsel was required by the rules of the Eastern District–without a statement of reasons by the court. Defendant Laura's primary counsel, who was not dismissed, was not a member of the Pennsylvania Bar, but was a member of the New Jersey Bar. The *Laura* case is distinguishable from the case at bar in that it was a federal prosecution, where different eligibility requirements for admission before the court exist, and in that the attorney involved had previously been admitted to represent Mrs. Laura and was subsequently removed without a hearing or a statement of reasons for the dismissal. There, the 3rd Circuit Court of Appeals held that counsel cannot be dismissed without a hearing and a statement of reasons for the dismissal. The court

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5. *R.* 1:6-2 Form of Motion, reads in pertinent part, "If no objections are timely filed, and unless otherwise ordered by the court, oral argument shall be deemed to be waived."

went on to say that a defendant does not have the right to select a particular person as his counsel as an absolute right, but that the arbitrary dismissal of a defendant's counsel of choice does violate a defendant's Sixth Amendment right to counsel. *Id.* at 56-57.

Petitioner also relies on *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950) to support her general proposition. The New Jersey Supreme Court, in *State v. Kavanaugh, supra,* at page 19, noted that the *Cooper* case says only that a constitutional issue is raised if an attorney admitted pro hac vice is removed in midstream for no reason at all and without a chance to be heard.

Petitioner also relies on the case of *In re Evans*, 524 F.2d 1004 (5th Cir. 1975) in which a federal appeals court issued a writ of mandamus compelling the United States District Court for the Southern District of Mississippi to admit an attorney to appear pro hac vice in a tax matter. This case can also be distinguished from the case at bar in that it too was a federal matter with admission requirements that are different than in the State Courts. Admission in the federal courts generally requires only admission to any state bar. That, of course, is not the case for admission to the New Jersey Bar where admission is contingent upon successful completion of a written examination on New Jersey law.

Petitioner has been charged with crimes involving no particularly complex area of the law. There has been no showing that her defense could not be undertaken by any number of New Jersey attorneys with expertise in that particular field of law. There are no legal questions or discovery proceedings involving the law of foreign jurisdictions to be resolved. As the New Jersey Supreme Court has stated:

> "There is nothing provincial about the requirement for admission to practice in the Courts of a State. The Courts of every jurisdiction must have control of practice before them as an "incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." *State v. Kavanaugh, supra,* at 19.

The State of New Jersey submits that none of Petitioner Joyce Pagniello's constitutional rights have been violated by the denial of the pro hac vice application. Certainly, this Honorable Court has decided that Theodore Simon does not have a constitutional right to appear in the courts of a state in which he is not licensed. *Leis v. Flynt, supra.* On the facts of this case, denial of Mr. Simon's application was neither an abuse of the trial court's discretion nor a violation of petitioner's rights.

## CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALEXANDER D. LEHRER
*Monmouth County Prosecutor*

/s/ Leo P. Cox
LEO P. COX
*Counsel for Respondent*

# APPENDIX A

## LETTER OF DENIAL FROM THE HONORABLE PATRICK J. McGANN, JR., J.S.C.

Dear Mr. Silber:

The County Clerk has received and filed the entry of the not guilty pleas which were forwarded by messenger by you for the above defendants.

Also forwarded was a notice of motion to admit Theodore Simon Pro Hoc Vice for the purpose of representing Mrs. Pagniello. That motion is denied. *Burlington Co. Int. Med. Assn. v. American Medicorp Inc.*, 168 N.J. Super. 382 (Ch. Div. 1979).

It is, of course, inappropriate to represent both defendants. Please arrange to have a New Jersey attorney substituted for one or the other.

Very truly yours,

PATRICK J. McGANN, JR.
J.S.C.

PJMc/jc

CC: Paul Chaiet, Esquire
Theodore Simon, Esquire

# APPENDIX B

## SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: MONMOUTH COUNTY
INDICTMENT NO. 350-79

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THE STATE OF NEW JERSEY,

*Plaintiff,*

*vs.*

JOYCE PAGNIELLO and DOMINICK PAGNIELLO,

*Defendant.*

## ORDER DENYING MOTION TO ADMIT COUNSEL *PRO HOC VICE*

THIS MATTER having been opened to the Court by ALAN SILBER, ESQ., acting as attorney on behalf of defendant JOYCE PAGNIELLO herein, for an Order permitting THEODORE SIMON, ESQ. to enter this matter *pro hoc vice,* as attorney for said defendant; notice having been given to the MONMOUTH COUNTY PROSECUTOR; oral argument having been waived, pursuant to R. 1:6-2; the Court having considered the papers submitted in support of this Motion; and good cause appearing for the making of this Order;

It is on this 14th day of January, 1980,

ORDERED, that defendant's Motion for an Order permitting THEODORE SIMON, ESQ. to enter the matter as attorney, *pro hoc vice,* be, and the same is hereby denied.

/s/ P. J. McGANN
HON. PATRICK J. McGANN, JR., J.S.C.

# APPENDIX C

## ORDER ON MOTIONS/PETITIONS
(Filed February 21, 1980)

Moving Papers Filed—January 29, 1980
Answering Papers Filed—February 9, 1980
Date Submitted to Court—February 15, 1980
Date Decided—February 20, 1980

### ORDER

This matter having been duly presented to the court, it is hereby ordered as follows:

Motion for leave to appeal denied.

Supplemental:

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Elizabeth McLaughlin,
Clerk

FOR THE COURT:

/s/
WILLIAM G. BISCHOFF
P.J.A.D.

Witness, the honorable William G. Bischoff , presiding Judge of Part E , Superior Court of New Jersey, Appellate Division, this 20th day of February , 1980.

/s/ Elizabeth McLaughlin
Chief of the Appellate Division

# APPENDIX D

## SUPREME COURT OF NEW JERSEY

M-663 SEPTEMBER TERM 1979

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STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

*vs.*

JOYCE PAGNIELLO,

*Defendant-Movant.*

## ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING MOTION FOR LEAVE TO APPEAL ORDER ENTERED BY SUPERIOR COURT OF NEW JERSEY

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of April, 1980.

/s/ Stephen W. Townsend,
Clerk